

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

30-4

318

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1177

ANDREW A. COOK

-1-

Appellant

-vs-

UNITED STATES OF AMERICA

Appellee

On Appeal from a Jury Verdict
of the UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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United States Court of Appeals
for the District of Columbia Circuit

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ANDREW A. COOK, :
Appellant :
-vs- : No. 71-1177
UNITED STATES OF AMERICA : September Term, 1970
Appellee :

CRIMINAL APPEAL FROM A DECISION OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANT COOK

This case has not previously been before this Court.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the Trial Court's failure to grant a requested mistrial after repeated cross-examination of witnesses by the Government on irrelevant, immaterial and prejudicial evidence pertaining to a collateral matter, (narcotics) constitute reversible error?
2. Did the Trial Court exhibit a bias and preconceived opinion of the guilt of Appellant Cook which unduly prejudiced its rulings on evidence and caused it to inject itself into the Trial by its examination of a key defense witness on a significant matter not raised on direct or cross examination to the detriment of the Appellant Cook, thus requiring a reversal?
3. Did the Court err in failing to grant a new trial based upon the presence on the Jury of a Juror who knew the Defendant Butler and knew a key defense witness, George Howard, but mistakenly or wrongfully failed to answer the Voir Dire questions as to that fact, or bring it to the attention of the Court after the Trial started?

REFERENCES TO PARTIES AND RULINGS

1. As to Issue No. 1, the Court is referred to the following pages of the Transcript:

Direct Testimony of the Defendant Andrew A. Cook T 227, 233

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Direct Examination T 273

Cross Examination T 293 - 296

Recross-examination T 303 - 307

Direct Examination of the Co-Defendant, George Butler T 374 - 381

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2. As to Issue No. 2.

Comments of the Court to Counsel T 396

Comments at Bench Conference by Government Counsel T 397

Court's examination of the witness, Roman Elliot Hastings T 351 - 352

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The Motion for a New Trial Filed by the Co-Defendant Charles G. Butler and Joined in by the Appellant Andrew A. Cook, which was denied by the Court.

STATEMENT OF THE CASE

The Defendants were indicted on a three-count indictment charging Armed Robbery, Robbery, and Assault with a Dangerous Weapon, pleaded Not Guilty and were found guilty as to Counts One and Three by a Jury, and Sentenced by the Court on the 26th day of February, 1971. The Defendant Andrew A. Cook received not less

than three years and not more than twelve years on Count One and not less than three years and not more than nine years on Count Three. Sentences on Counts One and Three were to be served consecutively to any Sentence imposed prior to this date by any Court in this, or any other jurisdiction, State or Federal.

The Case came on for hearing before the Honorable George L. Hart, Jr., United States District Judge, and a Jury on Monday, December 14, 1970.

The gravamen defense of both the Appellant Cook and his Co-defendant Butler was an alibi.

At T 11, on Voir Dire, the Government asked the Jury whether there was any one among them who was acquainted with the Defendants in this case. The assumption from the silence of the Jury was that none had made the acquaintance of the two Defendants. At T 16 on Voir Dire, the Jury was asked whether they were acquainted with Mr. George Howard, among others, one of the potential witnesses for the defense, and by their silence the Jury indicated that they were not so acquainted.

The Government presented its case in chief, which consisted of the testimony of one alleged eye-witness and the officers who subsequently arrested the accused and conducted a search of the vehicle in which they were riding.

After the Government rested, the Appellant Andrew A. Cook hereinafter referred to as Mr. Cook, commenced his defense, and

...to testify on his own defense. At T 227, Mr. Cook was asked "When had the subject matter of going to Snowball's first come up?" His non-responsive answer was that someone first said something about dope. He continued in response and stated somebody mentioned some narcotics. At T 233, on cross-examination, Government counsel elicited the fact that the Defendants had indulged in narcotics which they purchased from Snowball. Thereafter, at T 271, there was a Bench Conference concerning the testimony of witnesses and their possible self-incrimination based upon narcotics violations. Mr. Cook's Co-defendant, Charles G. Butler, presented an alibi witness, George Sullivan. At T 278, he was asked how long he was at "Snowball's house" and what he did there. His answer was that he fooled around with drugs. Thereafter on cross-examination, Mr. Sullivan was drawn out into a long discussion about the happenings at "Snowball's" house, T 295-297, and the objection was made by Cook's Counsel as to the materiality or relevancy of this line of questioning. The Court overruled the objection on the grounds of credibility and the discussions about what occurred at Snowball's house were gone into with particular reference to capsules of heroin, T 298. At that point, Mr. Cook's Counsel below moved for a mistrial on the basis of prejudicial and inflammatory use of such testimony.

Although the Record at T 299 indicates that Defense Counsel below denied that the Defendant Cook had raised the question of

narcotics in his direct examination, this was obviously the fact of the matter, as shown at T 227. There, Mr. Cook had mentioned narcotics in a non-responsive answer to his Counsel's question. He was asked when the subject matter of going to "Snowball's" had first come up and replied that someone first said something about dope. He then stated somebody mentioned narcotics. Thereafter, Government Counsel, on re-cross-examination, continued to inquire into the question concerning drugs, T 305, 306, the re-cross-examination extending into minute detail, and a discussion between the Defense Counsel for Co-defendant Butler and the Government Counsel and the Court ensued. Thereafter, at a Bench Conference, Government Counsel set forth its position, namely, that it was testing credibility and determining if the Defendants were "high on heroin". During the examination of the Co-Defendant Butler by his Counsel, reference was again made to "Snowball's", T 374, and at T 380 further reference to Defendant Butler's release from the General Sessions Court with a negative finding as to narcotics in his system.

At T 392, on cross-examination, Government Counsel again referred to Snowball's house. Further references at T 430 and 439 came after the Jury Verdict and refer more particularly to the attitude of the Court on the issues presented.

ARGUMENT

I. The Trial Court's Failure to grant a requested mis-trial after repeated cross-examination by the Government on irrelevant, immaterial and prejudicial evidence pertaining to a collateral matter (narcotics), constituted reversible error. On the direct examination of Mr. Cook, he referred to his visit to Snowball's house, and injected into the trial below the statement as to narcotics. Thereafter, the matter ballooned out of all proportions, and over objection was allowed to poison the trial below to the point that a reversal is required.

With respect to the relevance of evidence, it is generally conceded that any legally competent evidence, which when taken alone or in conjunction with other evidence, tends to prove or disprove a material or controlling issue and sheds any light upon or touches the issues in a way to enable the Jury to draw a logical and reasonable inference with respect to the matter of a principal fact in issue. It is relevant by the Court in Fowel v. Wood, (1948), 62 A. 2d 636, the Municipal Court of Appeals for the District of Columbia at page 637, where it held that any evidence which is relevant and probative of some fact in issue is relevant and prima facie admissible unless it conflicts with some settled exclusionary rule. This is well settled

law, and the Court cited 20 Am. Cr. Crim. 2d 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Mr. Cook contends that the narcotic evidence, even though initially elicited from him in an attempt to answer a question which did not require the particular answer given by him, is a collateral matter. The defense argues that it might otherwise be relevant by way of cross-examination notwithstanding its insertion into the case a new and controversial matter which resulted in the confusion of issues and, the Appellant believes, caused prejudice wholly disproportionate to the value and usefulness of the offered evidence. In such cases, and Mr. Cook submits that this is one of them, such evidence should be excluded.

In the case of Yogis v. Sylvester (1961), 174 A. 2d 122, 148 Conn. 116 (1961 A.M.R. 15 12), the Connecticut Supreme Court of Errors, while talking in a Criminal Conversation and Alienation of Affections suit, clearly pointed out that whether particular acts of misconduct are relevant to lack of veracity depends on whether they have a logical tendency to indicate a lack of veracity. In the instant case, the Government relied upon the narcotic evidence

as testing the credibility of the witness. In fact, however, the Government went far beyond any possible testing of credibility of the witness with the use of evidence as to narcotics which, in and of itself, has no logical tendency to indicate a lack of credibility. The matter of narcotics was known to the Government prior to the institution of the trial, and was not an issue in the trial, which was based solely on the identification of the Government witness versus the alibi of the Defendants and the witnesses for the Defense.

In maintaining clearly in mind the distinction between irrelevancy and immateriality, Mr. Cook contends that the evidence as to narcotics was both irrelevant and immaterial. The evidence was irrelevant in that it did not logically tend to prove or disprove any material fact or proposition which was not at issue.

Further, the evidence did not link up other evidence or prove an ultimate fact in issue, but was merely designed to cloak the Defendant with an aura of non-believability by preying on the passions of the Jury with continual references to the use of narcotics.

In the case of Ewing v. United States, (1942), 77 U.S. App. D.C. 14, 135 F. 2d 633, this Court spoke through Associate Justice Rutledge in a rape case in which the Government raised a question concerning relations between

... the Appellant for purposes of impeaching the former's credibility. This is the same argument the Government made in the Court below. It is always true that a witness may be cross-examined as to facts which showed his willingness to be unscrupulous in giving testimony for impeachment purposes. However, a serious question arises when, under the guise of impeachment, the Government continually hammers at an irrelevant issue in the case, whose only purpose could be to prejudicially influence the Jury, and has no probative value whatsoever in the instant case. Bogorad v. Rosenberg, (1981) 81 A. 2d 342 (Man. C. App. for D.C.); 20 Am. Jur. 2d, § 232, et seq.

The Trial Judge has both the duty and the prerogative of keeping the evidence within reasonable limits, consistent with the proper objectives of receiving all competent evidence which has any probative value on the disputed issues to the end that truth be ascertained and the issues correctly resolved. He has the corresponding duty and prerogative of excluding evidence not covering or within the confines of that purpose. That he failed to do in the instant case.

II. The Trial Court Exhibited a Biased and preconceived opinion of the guilt of the Appellant Cook which unduly prejudiced his rulings on evidence and caused it to inject

itself into the Trial by its examination of a key defense witness on a significant matter not raised on direct or cross-examination to the detriment of the Appellant Cook, thus requiring a reversal.

The conduct of the Trial Judge in any case must be fair to both sides, and undoubtedly a new trial may be ordered because of prejudicial conduct on the part of the Judge in the course of the trial of the case. Mr. Cook is mindful of the fact that ordinarily a trial judge may cross-examine witnesses to a considerable extent without creating a ground for a new trial, provided that he does so in a fair and impartial manner and does not by the form or manner of his questions express or indicate to the jury his opinion as to the facts of the case or as to the weight or sufficiency of the evidence. It is this latter emphasized portion of the proposition which Mr. Cook contends was violated by the Trial Court. This objection must, of course, be read together with the Court's previous failure to properly rule on the evidence as to narcotics.

During the course of the trial, Rodman Elliot Haskins was called as a witness on behalf of the Defendant Butler, T. 337. His testimony, if believed, would establish an alibi for both Butler and Cook. To that extent, he was -

very important witness, and critical to the defense. After examination by Co-defendant Butler's Counsel and Cross-examination by the Government Counsel, U 337-240, the Court proceeded to cross-examine this witness. Bearing in mind that the prior testimony of the witness concerned his view about a particular Thursday evening when he allegedly saw the defendant Butler at the bowling alley and discussed his bowling game with him. Mr. Butler was allegedly at the bowling alley with the Co-defendant Butler at this time of the alleged occurrences, with which he was charged. The Court cross-examined the witness with reference to what had transpired at the bowling alley the week previous to the night that he saw the Co-defendant Butler. An examination of the testimony, U 353, clearly demonstrated the Court's attempt to discredit the witness. While a cold transcript presents difficulties when one is trying to read intention of the Court, this Record clearly indicates the Judge's injection of himself into the case with questions which can only be said to be an attempt to impeach this witness before the Jury. This, it is respectfully contended, constitutes prejudicial error requiring reversal. This must also be read together with the Court's comments after the Jury returned the Verdict, U 381, where the Court stated,

"Well, I, I strongly suggest that this whole robbery is as a result of the use of narcotics." This Court, in a Per Curiam Opinion in Whittaker v. McLean, (154), 72 App. 2d 622, discussed the right of an accused to be tried by a Judge who is reasonably free from bias. The Court stated that such a right is part of a person's fundamental right to a fair trial, and it, before a case is over, may in some cases become overpowering, it disqualifies him. In the instant case, Mr. Cook contends that it is the basis for a reversal. The Appellate recognizes and the Whittaker case so holds, that often some degree of bias develops inevitably during a trial, and that judges cannot be forbidden to feel sympathy or aversion for one party or the other. In the instant case, however, the Judge's bias became overpowering, in the sense that he was examining and pushing the issue of the credibility of a key defense witness in an open, notorious and obvious manner, which tended to display his, i.e., the Judge's disbelief of that witness' testimony. It is for this reason that the actions of the Judge require the granting of a reversal.

###. The Court erred in failing to grant a new trial based upon the presence on the Jury of a Juror who knew the Defendant Butler, and a key defense witness, George Howard, who

the Juror mistakenly or wrongfully failed to answer Voir Dire questions as to that fact or bring the fact to the attention of the Court after the Trial started. Counsel for the Co-Defendant Butler filed a Motion for a New Trial, which was joined in by Counsel for Defendant Cook below, insofar as the allegations in the motion would have inevitably affected Mr. Cook's right to a fair and impartial Jury as a Co-defendant of Butler's.

Subsequent to the Verdict, the Defendant Butler reported to Trial Counsel that one of the Jurors, Mayfield C. Irick, was known to him. This was the first indication of this fact to Counsel below. A subsequent check disclosed that the Defendant Butler had been to Irick's home many times, and knew the father (Juror) Mayfield C. Irick, and Mr. Irick knew him. It was further reported by the Defendant Butler that he had ridden home with Defense witness Rodman Eastins and learned that the Juror had asked his son if he knew the Defendant Butler, and his son had replied in the affirmative. The above facts were verified by Counsel on December 17, 1970.

The Record discloses that appropriate Voir Dire of the Jury, giving the name of the witnesses, was made, and the Juror did not acknowledge knowing the Defendant. Even after he had learned that the Defendant was known to him,

the Juror failed to come forward with the information and disclose the same voluntarily to the Court.

The right of the accused to enjoy a speedy and public trial by an impartial Jury is guaranteed to him by the Sixth Amendment of the Constitution of the United States. Right to an impartial Jury is impaired where a Juror knows the Defendant or a witness. Such impairment is obvious, since it can affect the impartiality of the Juror as well as the Jury as a whole, insofar as that particular Juror expresses any comments to the Jury as a whole.

Due process demands that Jurors properly answer Voir Dire questions. In the event that the matter comes to his attention subsequent to Voir Dire, he is under a duty to bring the matter promptly to the attention of the Court. Actual prejudice is not essential to require the granting of a New Trial. It is sufficient if there is a probability that the Defendant was or may have been prejudiced thereby. United States v. Roberts, 179 F. Supp. 478 (D.C. 1959). It is a Juror's obligation, his duty to answer all Voir Dire questions affecting his qualifications honestly. Concealing a material fact which, if disclosed, may well have induced Counsel to strike him from the Jury, is grounds for a new trial when disclosed. Carpenter v. United States, (1938), 100 F. 2d 711, 717

(D. C. Cir.)

In Marvins Credit Inc. v. Steward, (1937), 133 A. 21 473, (App. D.C.), the Court dealt with a matter where a Juror did not reveal that the Juror had a charge account with the Plaintiff, and as a result, Plaintiff was entitled to a new trial. The Court there stated:

"We think that the rule to govern...may be summarized as follows: Full knowledge of all relevant and material facts that might bear on possible disqualification of a juror is essential to a fair and intelligent exercise of the right of counsel to challenge either for cause or peremptorily. It is the duty of a Juror to make full and truthful answers to such questions as are asked, neither falsely stating any fact nor concealing any material matter. If a Juror...conceals a material fact relevant to the controversy, and such matters, if truthfully answered, might establish prejudice or work a disqualification of the juror, the party misled or deceived...upon discovering the fact of the juror's incompetency or disqualification after trial, may assert that fact as ground for and obtain a new trial, upon a proper showing of such facts, even though the bias or prejudice is not shown to have caused an unjust verdict, it being sufficient a party, through no fault of his own, has been deprived of his constitutional guarantee of a trial of his case before a fair and impartial jury." (emphasis in original)

See also 39 A. J. Jur., New Trial §45; 61 C.J.S. p.

115.

Irrespective of Co-defendant Butler's knowledge, such knowledge as to the Juror being on the Jury cannot be imputed to Mr. Cook. Therefore, the prejudice is obvious, and requires reversal.

CONCLUSION

In Bracey v. United States, (1944), 79 U.S. App. D. C., 23, 142 F. 2d . . , cert. denied, 322 U.S. 702, and in McHale v. United States, 35 F. 2d 757, 75 (D.C. Cir. (1956)), the Court stated:

"[W]hen several people are tried together there is a danger that adverse evidence against some of the defendants will improperly rub off on the co-defendants." This is equally true where the Court indicates its bias in the method of cross-examination, and a Juror known to the Co-defendant does not disclose this information on Voir Dire, or subsequent thereto if he became aware of the fact afterward.

For the foregoing reasons, it is respectfully submitted by Appellant Andrew A. Cook that his conviction on the Counts below should be reversed.

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing Brief for Appellant Andrew A. Cook was mailed, postage prepaid, this 4th day of June, 1971, to Counsel for Appellee, to-wit:

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Jules Fink

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1177

UNITED STATES OF AMERICA, *Appellee,*

v.

ANDREW A. COOK, *Appellant.*

Appeal from the United States District Court
for the District of Columbia

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LEONARD W. BELTER,
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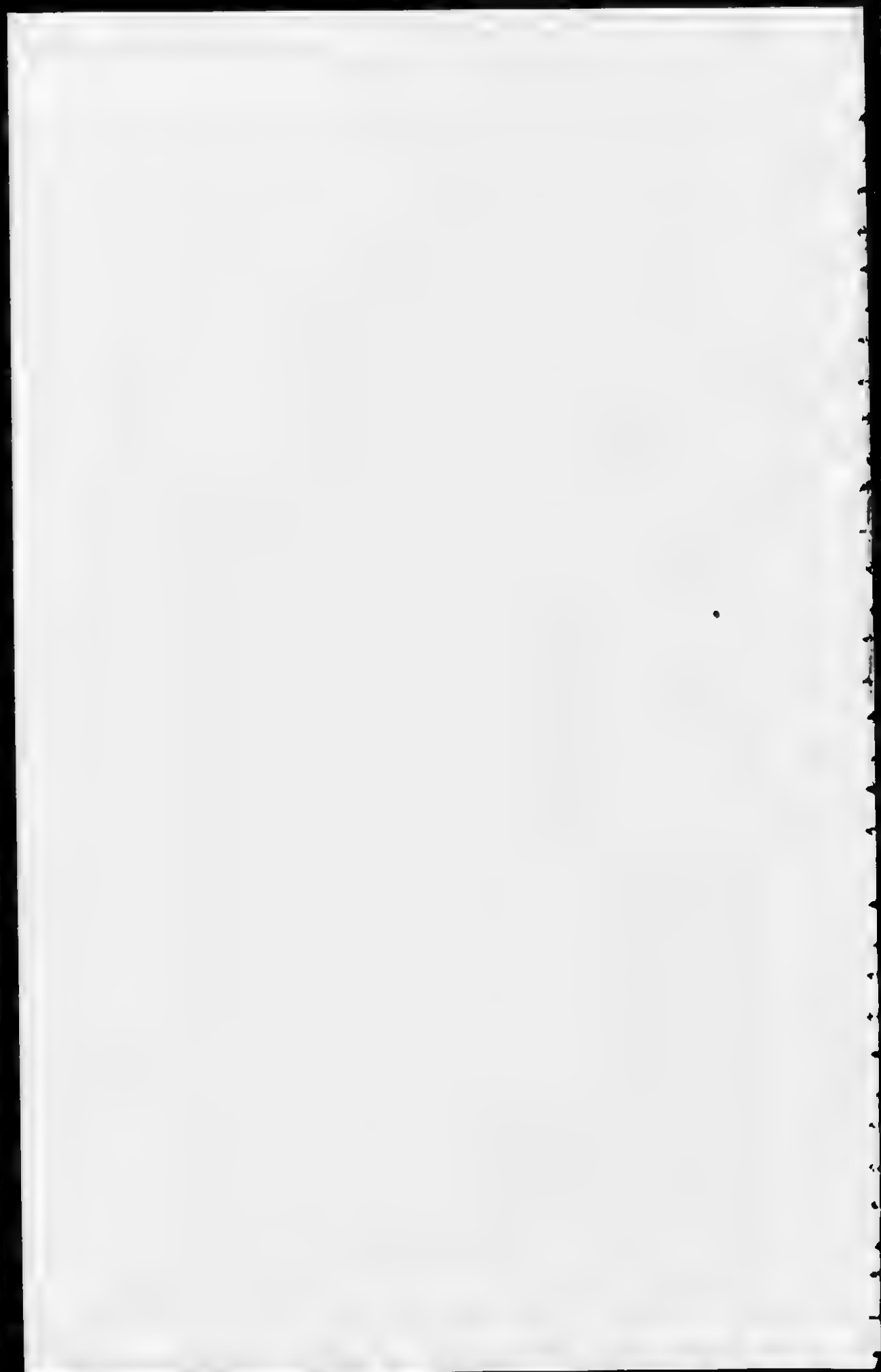
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United States Court of Appeals
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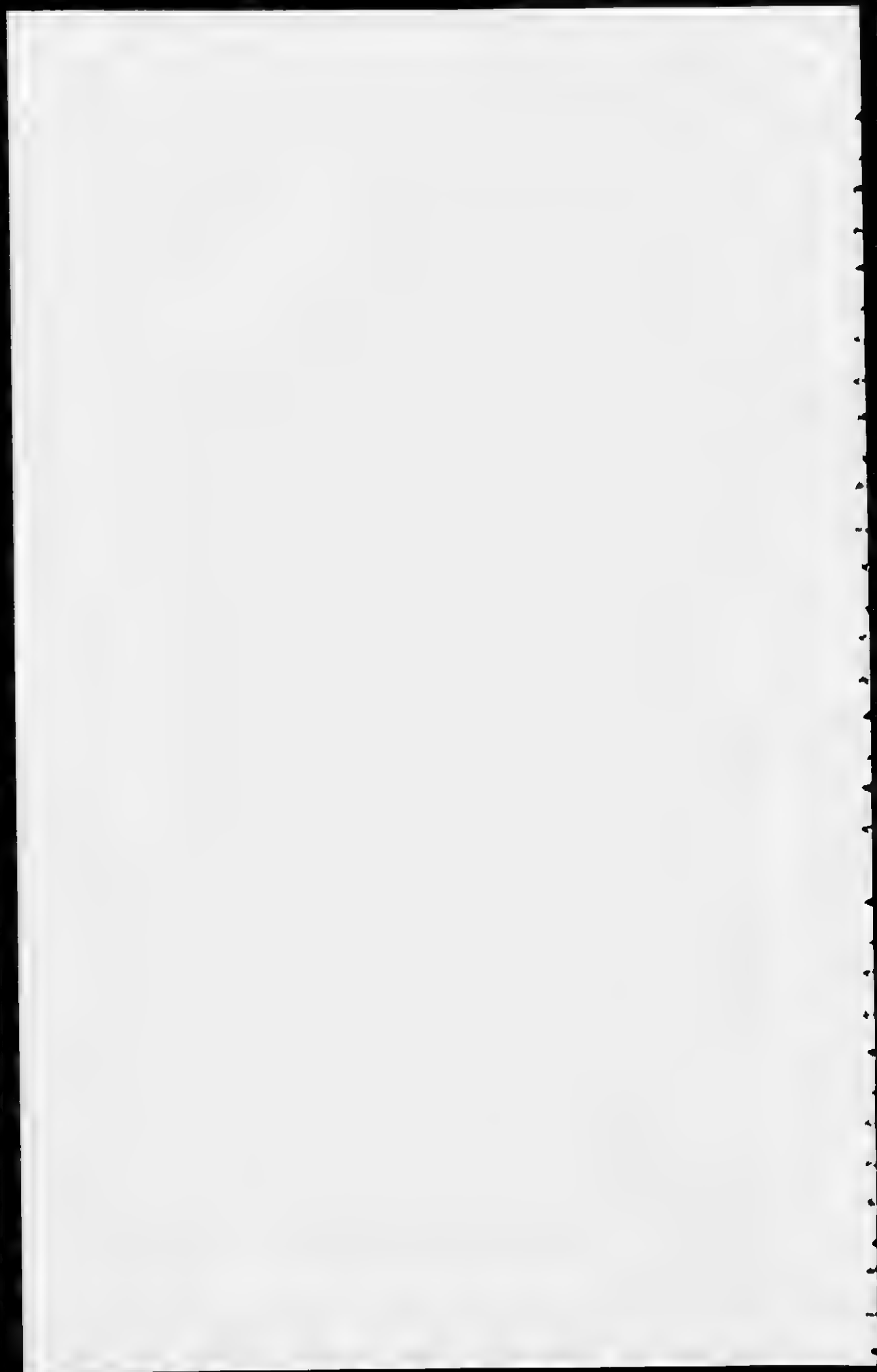
In the opinion of appellee, the following issues are presented:

I. Whether the trial court erred in refusing to grant a mistrial when the prosecutor cross-examined defense alibi witnesses on their activities at the crucial time, where those activities consisted in part of a session of drug-taking?

II. Whether the trial court's questioning of one defense witness out of eight presented by the defense was so improper that appellant was denied a fair trial, where the witness had testified in great detail to an incident occurring several months earlier, and the court's questions were aimed at testing the witness' memory so that the jury would be aided in evaluating his credibility?

III. Whether the trial court properly denied appellant's motion for a new trial, when the evidence at the hearing on the motion revealed that one of the jurors had seen appellant's co-defendant on three or four occasions several years earlier but had never spoken to him, and when this relationship was not realized either by the juror or by the co-defendant until after the trial had begun?

* This case has not previously been before this Court.



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1177

UNITED STATES OF AMERICA, *Appellee*,

v.

ANDREW A. COOK, *Appellant*.

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By an indictment filed June 30, 1970, appellant and his co-defendant Charles G. Butler were each charged with armed robbery (22 D.C. Code §§ 2901 and 3202), robbery (22 D.C. Code § 2901), and assault with a deadly weapon (22 D.C. Code § 502). Trial by jury was had before the Honorable George L. Hart, Jr., on December 14, 15 and 16, 1970, and appellant and his co-defendant were each found guilty of armed robbery and assault with a deadly weapon. Pursuant to instructions no verdict was returned on the robbery count. On January 27, 1971, a motion for a new trial was heard and denied. On February 26, 1971, appellant was sentenced to confinement for three to twelve years on the armed robbery count and three to nine years on the assault with a

deadly weapon count, the sentences to run concurrently with each other and consecutively to any sentence imposed prior to that date. This appeal followed.¹

The Government's Case

Mr. Peter Dasilva had finished work at the Merkle Press on Rhode Island Avenue, N.E., at approximately 12:00 midnight on April 16, 1970, and had caught a bus, intending to go to his residence at 1815 17th Street, N.W. (Tr. 103-105). At North Capitol Street he alighted in order to transfer to another bus (Tr. 106); but since the other bus took five to ten minutes to arrive, he wandered away from the intersection (Tr. 156). Shortly thereafter, while he was alone in the 1700 block of North Capitol Street, a white Dodge Automobile² occupied by five persons crossed to his side, and one of the occupants asked him if he had seen "Bob" (Tr. 148). The car stopped in front of him (Tr. 108), and appellant, who was in the front on the passenger side, got out of the car with a small gun in his right hand (Tr. 111). He told Dasilva to put his hands up (Tr. 114). Charles Butler, who had been seated in the rear, got out of the car and approached Dasilva. The car's headlights were on (Tr. 109), and there was enough light to see by (Tr. 116). While appellant held the gun to Dasilva's neck,³ Butler searched his pockets, tore off his shoes and threw his wallet to the ground (Tr. 114). When Dasilva objected, appellant hit him in the chest with the gun (Tr. 134), stating, "We mean business" (Tr. 115). Six dollars and some change and his paycheck were taken from Dasilva's coat (Tr. 117). Butler got back into the rear seat, and appellant into the front, and as they left Dasilva wrote down the license number of the car, D.C. tags 683-136, on a piece of paper.⁴ He then

¹ Butler also appealed, but he chose not to go forward, and on June 21, 1971, this Court dismissed his appeal (No. 71-1201) on Butler's motion.

² He was able to tell that it was a Dodge by reading the name plate on the rear (Tr. 139).

³ From the feel of the weapon Dasilva could tell that it was a metal and not a plastic gun (Tr. 147).

⁴ The license plate was then located in its "normal" position on the car (Tr. 133).

went to a gas station two blocks away and phoned the police (Tr. 120).

Officer Alton Cooper responded to the scene and took the report from Mr. Dasilva. He broadcast a lookout for an automobile with D.C. tags number 683-136, occupied by five Negro males (Tr. 157-160). Officer Joseph Thomas and his partner, Officer Kenneth McGinnis, received this lookout at approximately 12:30 a.m. on April 17 (Tr. 165). At approximately 12:50 the dispatcher alerted them that the car was listed to a party living at 1367 Downing Street, N.E. (Tr. 166). They proceeded to this address and there spoke to Mr. William A. Butler, the father of the co-defendant Charles Butler (Tr. 166). Mr. Butler told them that the car was being driven by his son with four of his son's friends (Tr. 401, 403). They left and continued to look for the car. At 1:40 a.m., they spotted a car matching the description going west in the unit block of N Street, N.W. This car had no license plate in the rear (Tr. 168). They pulled the car, a white 1965 two-door Dodge, to the curb (Tr. 168, 172), and Officer McGinnis went around to the front of the car and ascertained that it had D.C. tag number 683-136 (Tr. 185). Butler was driving, and appellant was seated in the middle of the front seat. George Sullivan was seated on the passenger side of the front seat, and Arthur Meadows and George Howard were in the rear (Tr. 171). The occupants were arrested, and the car was searched. The rear license plate, D.C. tag number 683-136, was recovered from under the front seat on the passenger side (Tr. 171).

On April 23, 1970, at 8:30 p.m., Mr. Dasilva viewed a lineup at police headquarters at which he identified appellant and Butler⁵ as the culprits.

The Defense Case

The defense presented an alibi. The two defendants, together with George Howard and George Sullivan, related that they had all been over at appellant's home until approximately 12:00 midnight (Tr. 293, 311), when they all

⁵ There was testimony that at the lineup Mr. Dasilva identified Butler but stated that he was not sure of him (Tr. 174). His in-court identification was positive (Tr. 153). He was never shown any photographs (Tr. 150).

left in Butler's car. They drove to the Biggs Bowling Alley on Eastern Avenue, just on the other side of the District line, arriving at approximately 12:15 a.m. (Tr. 311). There Butler spoke to a friend of his named Rodney Haskins. Mr. Haskins corroborated this episode, relating that he remembered the evening because he had bowled his high series on that occasion (Tr. 344).

The group left the bowling alley at approximately 12:30 and repaired to the apartment of a friend named "Snowball" at Third and V Streets, N.E., arriving at approximately 12:45 (Tr. 296, 300). There they all "indulged in drugs" which Snowball had provided (Tr. 233). They left Snowball's at approximately 1:30 a.m. (Tr. 233, 300) and were proceeding to "Tiny" Butler's house when the police stopped them.

They all related that the car had been in an accident several days earlier, as a result of which the license plate could not be affixed to the car in the usual place and had instead been displayed in the rear window of the car (Tr. 204, 278).

The Post-Trial Hearing

Appellant and co-defendant Butler made a motion for a new trial on the ground that Mr. Mayfield Irick, Sr., one of the jurors in the case, was acquainted with Butler.* Butler testified at the hearing on the motion that he was a friend of Mayfield Irick, Jr., and that from 1963 to 1969 he often visited the Irick home. Approximately once a week during this time he saw Mr. Irick, Sr. (Tr. 417). At his trial, however, he did not recognize Mr. Irick, who was "just another man on the jury" to him (Tr. 425-426). On the evening of

* In the headnote to his argument (Brief, p. 12) appellant asserts that this juror also knew the defense witness George Howard, but he does not discuss this further. Defendant Butler had assumed that Howard was known to Mr. Irick, Sr., on the basis that "one time I was there [at the Irick home] and that Mr. Howard came in and he went up there more than I did" (Tr. 435). Mr. Irick, Sr., testified that he did not know Howard and had never seen him prior to the trial (Tr. 464).

the second day of the trial he learned through a chance conversation with Sam Irick, the younger brother of his friend Mayfield Irick, Jr., that Mr. Irick, Sr., was on his jury (Tr. 420). He did not inform his counsel of this fact until after "they slammed the door of the District Jail" (Tr. 433).

Samuel Irick testified that to his knowledge his father and Butler might have met a total of three times and had never conversed (Tr. 445). On the first night of the trial his father had asked him if he knew someone named Charles Butler. When he replied that he did, his father stated that he was then serving on Butler's jury. No further conversation ensued (Tr. 449). In the late afternoon of the second day of the trial, Butler had called to Samuel Irick from the street to come over to talk. Butler initiated the conversation, asking Sam if he knew that his father was on Butler's jury. He then asked Sam to talk to his father "to give me a little slack," which Sam refused to do (Tr. 447).

Mayfield Irick, Sr., related that when he was called as a juror, and during the voir dire examination, he did not recognize the defendant Butler (Tr. 459).⁷ About three hours after he had been seated as a juror, he began to realize that he might have seen Butler before (Tr. 460). His suspicions were confirmed when his son Sam told him that evening that he knew Charles Butler. Mr. Irick, Sr., recalled having seen Butler approximately three or four times at his house, but he had never conversed with him (Tr. 461). He had not seen him in three or four years (Tr. 462). When the jury began its deliberations, Mr. Irick, Sr., had informed the other jurors that he knew Butler from being with his son (Tr. 463). The only response from the other jurors was to the effect that this was all right and that he still had to give his verdict (Tr. 467). He had never heard anything bad about Butler and had no ill feelings toward him in any way (Tr. 468).

⁷ He had never seen this appellant prior to the trial (Tr. 458).

ARGUMENT

- I. The trial court did not err in refusing to grant a mistrial when the prosecutor cross-examined defense alibi witnesses on their activities at the time in question, where those activities consisted in part of a session of drug-taking.

(Tr. 227, 233, 278, 300, 303, 328)

Appellant complains that the trial court erred in not granting his motion for a mistrial on the ground that he was prejudiced when evidence of narcotic activity was placed before the jury.

The context in which this evidence came in may be briefly summarized. The first witness for the defense was appellant. He related that the group decided to go to Snowball's after they left the bowling alley because "someone first said something about dope" (Tr. 227). The prosecutor then elicited, without objection, testimony that the group had bought and indulged in drugs at Snowball's (Tr. 233). The next defense witness, George Sullivan, related on direct examination that the group had "fooled around with drugs" (Tr. 278) at Snowball's. The prosecutor on cross-examination asked about the amount of drugs purchased, but the trial court stopped him (Tr. 298). At the bench the prosecutor requested that he be allowed to inquire concerning the money used to purchase the drugs. Appellant's counsel then moved for a mistrial, but he did not press his motion when informed that his client had initially brought in the evidence of drug-taking (Tr. 299). The prosecutor then continued his cross-examination in other areas. On redirect examination defense counsel asked Mr. Sullivan how much money was taken from him at the precinct and if it was his own money (Tr. 303). The prosecutor then inquired on recross regarding the money used to purchase the drugs and was told that Mr. Sullivan received his on credit (Tr. 305). The court refused to allow the prosecutor to inquire concerning the amount of drugs taken (Tr. 306). After Mr. Sullivan was excused, the prosecutor contended at the bench that this evidence was relevant in determining the witnesses' ability to

observe and to recall the events concerning which they testified (Tr. 307). The next defense witness, George Howard, was then asked, without objection, what drugs were taken and whether he was high when he left Snowball's (Tr. 328). No questions were asked of the final defense witness, the defendant Butler, concerning the narcotic activity.

This evidence, was submit, was clearly relevant and admissible. Four defense witnesses testified as part of the alibi defense that they were at Snowball's apartment in the early morning of April 17, 1970, arriving at approximately 12:30 to 12:45 a.m. (Tr. 300). The robbery victim did not state the time of the robbery other than to indicate that it took place after he had left work at midnight and while he was waiting for his second bus on the way home. The lookout was first broadcast at 12:30 a.m. The accuracy of the alibi witnesses' testimony was obviously crucial.

Once the defense chose to introduce evidence of the visit to Snowball's, the activities occurring there were open to cross-examination. As the Supreme Court has stated:

The witness having sworn to an alibi, it was perfectly competent for the government to cross-examine him as to every fact which had a bearing upon his whereabouts upon the night of the murder, and as to what he did and the persons with whom he associated that night. *Fitzpatrick v. United States*, 178 U.S. 304, 315 (1900).

Nor can the fact that the alibi consists, in essence, in criminal activity elsewhere bar cross-examination as to that activity. In *Hood v. United States*, 125 U.S. App. D.C. 16, 365 F.2d 949 (1966), the defense brazenly put on an alibi witness who testified on direct examination that the defendants were in his apartment at the crucial time. The prosecutor on cross-examination elicited the fact that at that moment the defendants had robbed the alibi witness at gunpoint and had left running. This Court observed:

When the defense sought to use that very incident for alibi purposes, the Government was free to develop *any* facts about it which tended to make it unavailable as an alibi. *Id.* at 18, 365 F.2d at 951 (emphasis added).

In the case at bar the prosecutor cross-examined each defense witness at length on all aspects of the alibi. His questions concerning the activities at Snowball's consumed a minute portion of each of his cross-examinations. Testimony regarding the narcotic activity was repeated because four separate defense witnesses referred to it. The prosecutor opined to the trial judge, correctly in our view, that evidence of drug intoxication was highly relevant to the credibility of the alibi witnesses and to their knowledge and recall of the critical times involved. *See* 98 C.J.S. *Witnesses* § 467 (1957), and cases cited therein. The trial court, in the exercise of its discretion, carefully limited any detailed portrayal of the incident.⁸ Appellant, we submit, cannot be heard to complain of a carefully limited cross-examination on an activity which he raised initially as an integral part of his defense.

II. The trial court's questioning of one defense witness was not prejudicial to appellant and was not indicative of any bias on the part of the court.

(Tr. 351-353; I-Tr. 411-412, 439) *

Appellant, in a sweeping attack on the trial court, asserts that it "exhibited a biased and preconceived opinion of the guilt of appellant Cook which unduly prejudiced his rulings on evidence and caused it to inject itself into the Trial by its examination of a key defense witness on a significant matter not raised on direct or cross-examination to the detriment of the appellant Cook, thus requiring a reversal." (Brief, pp. 9-10.) He advances a twofold basis for this at-

⁸ The only testimony of any detail which was allowed was the witness Thomas' testimony that the group had messed around with a little bit of "heroin and reefer" and that he was "not exactly" high when he left the apartment. Particularly in view of the wholly ambiguous statements volunteered by defense witnesses, we fail to perceive that this clarifying testimony is in any way prejudicial. It was clearly admissible insofar as it affected the witnesses' ability to observe and recall the events to which they testified.

⁹ That portion of the transcript covering the charge to the jury and the verdict is numbered in sequence with the same numbers as the motion for a new trial. The charge and verdict will be referred to as "I-Tr."

tack: the trial court's two-page questioning of one defense witness, and the trial court's remark made after the jury returned its verdict that it strongly suspected that the robbery was the result of the use of narcotics. Neither of these incidents offers any support for his contention.¹⁰

The principles applicable to the trial court's questioning of a witness are clear. A trial judge is not a mere moderator. *Quercia v. United States*, 289 U.S. 466, 469 (1933); *United States v. Wyatt*, 143 U.S. App. D.C. 136, 442 F.2d 858 (1971); *United States v. Barbour*, 137 U.S. App. D.C. 116, 420 F.2d 1319 (1969); *Jackson v. United States*, 117 U.S. App. D.C. 325, 329 F.2d 893 (1964). He is entitled "to make proper inquiry of any witness when he deems that the ends of justice may be served thereby and for the purpose of making the case clear to the jurors." *United States v. Barbour, supra*, 137 U.S. App. D.C. at 117-118, 420 F.2d at 1320-1321 (footnotes omitted). In reviewing his actions this Court should examine the entire record in order to "guard against the magnification on appeal of instances which were of little importance in their setting." *Glasser v. United States*, 315 U.S. 60, 83 (1942).

In the instant case the witness Haskins testified on December 15, 1970, about two separate conversations with defendant Butler on the evening of April 17, 1970, at the Riggs Bowling Alley. He had been bowling regularly on Monday, Tuesday and Thursday evenings at the same time. He was able to recall the substance of each conversation as well as his bowling score and other specifics of his bowling performance on that evening. The trial court asked the witness several questions about another evening at the bowling alley, obviously aimed at testing his memory, and the witness responded with detailed answers (Tr. 351-353).¹¹ Ap-

¹⁰ The remark made after the jury verdict obviously did not prejudice appellant. We likewise fail to see wherein it indicates any bias on the part of the trial court. The jury had found the defendants guilty of armed robbery, and there had been testimony from the defense concerning the use of narcotics at the time of the robbery. The remark, we submit, was more indicative of the court's perception of demonstrated facts than it was of any bias on its part toward appellant.

¹¹ While we recognize that this Court has rejected any quantitative ap-

pellant concedes the difficulty of discerning the court's intent from a cold record. We recognize the same difficulty, for this record could just as well support the inference that the trial court's questions enhanced this witness' stature in the eyes of the jury when he responded with detailed recollections and with no hesitation. Certainly there is absolutely no indication that the trial court's questions were indicative of his opinion of the facts of the case.¹²

This Court has on two occasions specifically upheld remarkably similar questioning by a trial judge. In *United States v. Barbour, supra*, the judge had questioned the defendant's alibi witnesses about their "familiarity with appellant's employment, the type of motor vehicle he drove, and the times at which he allegedly arrived at and departed from the witnesses' house." 137 U.S. App. D.C. at 117 n.7, 420 F.2d at 1320 n.7. In *Roberts v. United States*, 109 U.S. App. D.C. 75, 284 F.2d 209, *cert. denied*, 368 U.S. 863 (1961), the trial court questioned a defense alibi witness after extensive cross-examination by the prosecutor. This Court found no error, stating:

The trial court here sought to test the accuracy of the witness's memory by inquiring about her activities during the day prior to the attack, and thus to aid the jury in its determination of the witness's reliability and credibility. 109 U.S. App. D.C. at 76, 284 F.2d at 210.

The questions of the trial court here were similarly intended and were, we submit, equally free from error.

III. The trial court properly denied appellant's motion for a new trial.

(Tr. 409-479)

Appellant, citing no authority, baldly asserts that his "[r]ight to an impartial jury is impaired where a juror

proach to this problem, *United States v. Wyatt, supra*, 143 U.S. App. D.C. at 138, 442 F.2d at 860, we note that the only questioning of which appellant complains consumed two pages out of a 440-page transcript.

¹² The trial court carefully cautioned the jurors against inferring any such indication on its part (I-Tr. 411-412).

knows the defendant or a witness" (Brief, p. 14). This overbroad statement is not the law. *Swallow v. United States*, 307 F.2d 81 (10th Cir.), *cert. denied*, 371 U.S. 950 (1962); *see Carpenter v. United States*, 69 App. D.C. 306, 100 F.2d 716 (1938).¹³ Even if it were the law, it would be inapposite here.¹⁴ The mere passing acquaintance which was shown to exist in this case between the juror and this appellant's co-defendant does not constitute a logical reason for presuming that appellant was prejudiced.

Even if it could be said that a presumption of prejudice existed in this case, the evidence adduced at the hearing on the motion amply rebuts it. Mr. Irick, Sr., related that he had seen Butler three or four times and had not seen him at all in the past several years. He had never conversed with him and had no ill will towards him. The trial court did not improperly rely on this juror's testimony alone in finding no prejudice. *Ryan v. United States*, 89 U.S. App. D.C. 328, 330, 191 F.2d 779, 781 (1951), *cert. denied*, 342 U.S. 928 (1952). That the acquaintance was extremely slight was corroborated by the testimony of Samuel Irick and by the mutual failure of Mr. Irick, Sr., and the defendant Butler to recognize each other at the beginning of the trial. This circumstance also tends to confirm Mr. Irick's testimony that he was not untruthful in his responses to the questions on voir dire.¹⁵ Surely here as in *Ryan, supra*, "the question of bias or prejudice was susceptible of an intelligent judgment by the trial judge on the evidence adduced upon the hearing on the motion, and [this Court is] not warranted in overturning his conclusion." 89 U.S. App. D.C. at 332, 191 F.2d at 783.

¹³ In *Carpenter* this Court stated: "[T]he fact that a juror may know counsel is not of itself sufficient ground to challenge him for cause. Nor is the fact that a juror was involved with counsel in litigation a sufficient ground." 69 App. D.C. at 307, 100 F.2d at 717.

¹⁴ Mr. Irick, Sr., the juror complained of, did not know this defendant (Tr. 454) and did not know any defense witnesses. See note 6, *supra*.

¹⁵ The cases relied on by appellant involve untruthful answers or deliberate concealment by jurors. It is clear that there is no error where the relationship is not realized until mid-trial. *Carpenter v. United States, supra*, at 307, 100 F.2d at 717.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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